1993

The State of Utah v. Danny L. Herring : Brief of Appellee

Utah Court of Appeals

Steven B. Killpack; Attorney for Appellant.
Jan Graham; Attorney General; Kris Leonard; Assistant Attorney General; Attorneys for Appellee.

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 930006-CA
v.	:	
DANNY L. HERRING,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION OF TAMPERING WITH A WITNESS, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-8-508 (1990), IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE RAY M. HARDING, PRESIDING.

JAN GRAHAM (1231)
Attorney General
KRIS LEONARD (4902)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1022

Attorneys for Appellee

Steven B. Killpack (1808)
40 South 100 West, Suite 200
Provo, Utah 84601
Telephone: (801) 379-2570

Attorneys for Appellant

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 930006-CA
v.	:	
DANNY L. HERRING,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION OF TAMPERING WITH A WITNESS, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-8-508 (1990), IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE RAY M. HARDING, PRESIDING.

JAN GRAHAM (1231)
Attorney General
KRIS LEONARD (4902)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1022

Attorneys for Appellee

Steven B. Killpack (1808)
40 South 100 West, Suite 200
Provo, Utah 84601
Telephone: (801) 379-2570

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 930006-CA
v.	:	
DANNY L. HERRING,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a judgment and conviction by a jury of tampering with a witness, a third degree felony, in violation of Utah Code Ann. § 76-8-508 (1990).

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1993).

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW

The sole issue presented in this appeal is whether the evidence was sufficient to support defendant's conviction. In reviewing a jury verdict, this Court views the evidence and all inferences drawn therefrom in the light most favorable to the verdict and will only interfere when the evidence is so lacking and insubstantial that a reasonable jury could not possibly have reached the verdict beyond a reasonable doubt. State v. Burk, 839 P.2d 880, 884 (Utah App. 1992), cert. denied, 853 P.2d 897 (Utah 1993); State v. Salas, 820 P.2d 1386, 1387 (Utah App. 1991).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Any relevant text of constitutional, statutory, or rule provisions pertinent to the resolution of the issue presented on appeal is contained in the body of this brief.

STATEMENT OF THE CASE

Defendant Danny Herring was charged by information with witness tampering, a third degree felony, in violation of Utah Code Ann. § 76-8-508 (1990) (R. 1). A jury found him guilty as charged, and the court ordered a presentence report prepared (R. 66, 47). The court sentenced defendant to the Utah State Prison for an indeterminate term not to exceed five years, to run consecutively with the sentence he was then serving on other charges (R. 73-74).

STATEMENT OF FACTS

The facts are recited in the light most favorable to the jury's verdict. State v. Gray, 851 P.2d 1217, 1219 (Utah App. 1993); State v. Burk, 839 P.2d 880, 882 (Utah App. 1992), cert. denied, 853 P.2d 897 (Utah 1993).

Troy Lott, a long-time friend of defendant's, was the victim and principle witness in a previous trial in which defendant was tried on assault-related charges (R. 5, 10; Trial Transcript [hereinafter "Tr."] 6-7). At the preliminary hearing in the assault matter, Lott testified that defendant had kicked him in the face (Tr. 6-7, 9, 10, 12, 14-15, 35-36). The afternoon before the assault trial, defendant telephoned Lott solely to discuss the next day's trial (Tr. 5-6, 21-22, 27).

With no preliminary conversation, defendant asked if Lott was going to testify at the trial the following day (Tr. 6, 13). Lott replied that he was going to appear and testify (Tr. 13-14). When defendant asked what Lott was going to say, Lott responded that he "was going to tell the truth, the same thing [he] said in the preliminary [hearing.]" (Tr. 7, 14). Defendant claimed that he could not remember kicking Lott and asked whether it might have happened differently (Tr. 7, 14, 16, 37). Lott responded that he not only remembered defendant kicking him, but that he would say so at trial (Tr. 7, 14-16). Defendant remarked that it would help him out if Lott did not say that at trial (Tr. 7, 15). He then stated that Lott would be better off if he did not testify or defendant would bring up a murder Lott had allegedly confessed to several months earlier (Tr. 8, 15, 17).[1] Both men then hung up (Tr. 8, 16-17, 31). Lott immediately reported the phone call to the police (Tr. 21-22).

SUMMARY OF THE ARGUMENT

The evidence presented at trial, together with all reasonable inferences, was sufficient to establish that defendant, believing that an official proceeding was pending,

---

[1] Although defendant remembered the details of the phone conversation differently, he admitting bringing up the subject of the murder (Tr. 28-29). He claimed that when he reminded Lott about an earlier conversation in which Lott allegedly said that he did not remember defendant kicking him in the head, Lott responded that he did not remember saying that (Tr. 28). Lott then commented, "I think you know that you kicked me in the head twice and I think you ought to think about that[,]" to which defendant responded, "Well, I think you ought to think about the gun spree you told me about" (Tr. 28-29).

attempted to induce or otherwise cause a witness to withhold testimony or information. Accordingly, the jury had sufficient evidence on which to base its conviction of defendant for tampering with a witness.

ARGUMENT

POINT I

THE EVIDENCE WAS SUFFICIENT TO SUPPORT DEFENDANT'S CONVICTION OF TAMPERING WITH A WITNESS

Defendant argues that the evidence is insufficient to prove that defendant, believing that an official proceeding or investigation was pending or was about to be instituted, attempted to induce or otherwise cause Lott to withhold any testimony, information, or item. See Utah Code Ann. § 76-8-508(1)(b) (1990).[2] Relying on the dissenting opinion in State v. Burk, 839 P.2d 880, 888-89 (Utah App. 1992), cert. denied, 853 P.2d 897 (Utah 1993), defendant contends that the language used by defendant amounted to a mere expression of his belief that his own interests would not be served by Lott's proposed testimony,

---

[2] Section 76-8-508 provides in pertinent part:

> (1) A person is guilty of a third degree felony if, believing that an official proceeding or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a person to:
>
> (a) testify or inform falsely;
>
> (b) withhold any testimony, information, document, item;
>
> (c) elude legal process summoning him to provide evidence; or
>
> (d) absent himself from any proceeding or investigation to which he has been summoned.

and that defendant's language, which was devoid of threats, promises, or extended argument, did not amount to inducement to change or withhold testimony. Br. of App. at 11-16.

This Court reviews a claim of insufficient evidence under a well-settled standard:

> [T]he evidence and the reasonable inferences which might be drawn therefrom must be viewed in the light most favorable to the jury verdict. A jury conviction is reversed for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.

Burk, 839 P.2d at 884 (quoting State v. Salas, 820 P.2d 1386, 1387 (Utah App. 1991) (quoting State v. Johnson, 774 P.2d 1141, 1147 (Utah 1989))).

Defendant does not challenge the sufficiency of the evidence establishing his belief that an official proceeding or investigation was pending. He challenges only the evidence establishing his attempt to induce or otherwise cause Lott to withhold any testimony, information, or item. Lott related his phone conversation with defendant as follows:

> Q [DEFENSE COUNSEL]. . . . But as best you can remember the exact words, what did [defendant] say when he brought the subject up?
>
> A [LOTT]. The subject of?
>
> Q. Of testifying.
>
> A. He asked me if I was going to testify. I told him yes, I was.
>
> . . .

[He a]sked me what I was going to say. I said I was going to tell the truth, the same thing I said in the pretrial.

. . .

He told me he couldn't remember kicking me in the face. Asked me if I might have done it when I jumped in the back of the truck. I told him, "No, Danny[,] you kicked me in the face, and I remember and I'm going to tell it the same as I did in the pretrial."

Q. And what was the next thing that was said?

A. Well, he said it would really help him out a lot if I didn't testify to that.

Q. Were those his words to the best of your memory?

A. Yes.

Q. And what did you say?

A. I didn't say nothing. Then he just -- that's when he brought up the card game and Pleasant Grove.

(Tr. 13-16). Lott detailed the remark concerning Pleasant Grove at another point in the examination:

A. [Defendant] brought up a time of we was having a party at a friend's house in Pleasant Grove, and I guess I'd told him about a shooting spree or something. He brought that up and said if I was to testify tomorrow, I'd be better off if I didn't testify tomorrow or he would bring that up.

(Tr. 8).[3]

---

[3] The "shooting spree" included an alleged murder. The testimony indicated that one night several months before the disputed phone conversation with Lott, defendant and Lott were doing a lot of drinking at a party in Pleasant Grove when Lott had told defendant about a shooting spree Lott had been involved in (Tr. 8, 17, 29). Lott claimed that several months earlier, he and a couple of his friends were drinking and driving around a rural area shooting "whatever was moving" (Tr. 30). They were interrupted by a man who demanded to know why they were shooting his coyote (Tr. 30-31). Because Lott and his friends didn't want to get in trouble, they allegedly shot the man, put him in the back

Defendant breaks the conversation into five individual pieces, characterizing defendant's questions largely as harmless inquiries or appropriate interrogation to be made of witnesses following any preliminary hearing. He contends that the final statement threatening to incriminate Lott in a murder cannot support the conviction when "viewed in the light of [the parties'] relationship and the Defendant's perception of [Lott's] rudeness[.]" Br. at 15. However, this Court reviews the evidence in a light most favorable to the jury's verdict. Burk, 839 P.2d at 884. By rendering the guilty verdict, the jury rejected defendant's perception of the conversation. Moreover, the questions in this case were posed not by an attorney but by the accused on his own initiative immediately before trial. The evidence, examined in the proper light, is sufficient to support defendant's conviction.

The testimony indicated that defendant called the State's key witness the afternoon before trial for the sole purpose of discussing the testimony. Defendant elicited the fact that Lott intended to appear at trial and that his testimony would parrot his incriminating testimony at the preliminary hearing. Defendant then suggested another scenario for Lott's injury, which Lott refused to accept. Immediately thereafter, defendant stated that Lott's testimony would be detrimental not only to defendant, but to Lott as well, explaining that if Lott

---

of their truck, tied an anchor to him, and threw him into the lake (Tr. 30-31).

testified at the trial, defendant would implicate Lott in a murder. This express type of cause-and-effect statement constitutes the tangible indicia of inducement required by the dissent in Burk, upon which defendant relies. 839 P.2d at 889. It may reasonably be viewed as a threat and was, in fact, reported to the police by Lott as a threat accompanied by a request "to testify to something other than what he had testified in the preliminary hearing." (Tr. 22). Defendant believed that Lott may well have been involved in a murder (Tr. 29, 31-32, 41), and, although defendant knew that he had already reported the murder story to the authorities, his threat falsely suggested to Lott that he had not yet said anything to anyone (Tr. 31, 39-41). From the testimony before it, the jury may reasonably have determined that defendant made the statement to Lott, not as a reflexive retort to perceived rudeness, but on the chance that the murder story was true and that Lott would be intimidated to change his testimony to avoid having his participation in the murder made public.

Moreover, Lott testified that he had been intimidated by defendant's suggestion that if Lott incriminated defendant, defendant would retaliate in kind, despite the fact that Lott ultimately appeared at trial and testified against defendant (Tr. 9, 18-19). Because Utah's witness tampering statute does not require that the witness be affected by the attempted inducement, the affect on the witness is not necessarily dispositive of an accused's culpability. See State v. Rempel, 785 P.2d 1134, 1137

(Wash. 1990) (involving a statute similar to Utah's). However, the affect may prove relevant. See State v. Tolman, 775 P.2d 422, 424 (Utah App. 1989) (conviction supported, in part, by witness' withholding of a report from a legal proceeding because comments from defendant made the witness worry that production of the report would cause trouble for defendant), cert. denied, 783 P.2d 53 (Utah 1989). Here, the jury could reasonably have found that the threat of being implicated in a murder is likely to result in some degree of intimidation, and that Lott's intimidation, although not sufficient to change his testimony, was at least a foreseeable, if not an intentional, result of defendant's threat.

Accordingly, the evidence is sufficient to support defendant's conviction for tampering with a witness.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's conviction and sentence.

RESPECTFULLY SUBMITTED this 12th day of October, 1993.

JAN GRAHAM
Attorney General

KRIS C. LEONARD
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing Brief of Appellee was mailed, postage prepaid, to Steven B. Killpack, attorney for appellant, 40 South 100 West, Suite 200, Provo, Utah 84601, this 12th day of October, 1993.